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MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

October Term, 1975
No. 75-1330

DORCEA MIELKE, *et al.*,
Petitioners,

vs.

SINGARA GROTTO, INC., *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF APPEALS, ERIE COUNTY,
SIXTH JUDICIAL DISTRICT OF OHIO

RESPONDENTS' BRIEF IN OPPOSITION

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REASONS FOR DENYING THE WRIT

This action was tried in the state courts of Ohio and was based upon the substantive and procedural law of the state. A portion of the procedural law is Rule 50 (B) of the Ohio Rules of Civil Procedure. The Ohio rule is based upon Rule 50 (b) of the Federal Rules of Civil Procedure which provides, in part, for the granting of a motion for judgment notwithstanding the verdict. At the trial of this case, the defendants made successive motions for directed

verdict at the close of the plaintiffs' evidence, at the close of the defendants' evidence, and at the close of all of the evidence. Thereafter, and following the jury verdict, the defendants moved for judgment notwithstanding the verdict. This motion was granted by the trial court. As one reads the Petition presented here, it is observed that the petitioners seek to attack the constitutionality of such procedure. I would bring to the Court's attention that this precise question was decided as late as 1967 in the case of *Neely v. Martin K. Eby Construction Co., Inc.*, 386 U.S. 317, 18 L. Ed. 2d 75. In reference to the Federal rule, the Court said in *Neely* "It is settled that Rule 50 (b) does not violate the Seventh Amendment's guarantee of a jury trial. *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 86 L. Ed. 147, 61 S. Ct. 189".

I would further note that the petitioners here concede that the Court has held that "A trial by jury in suits at common law pending in the State courts is not * * * *a privilege or immunity* of national citizenship, which the States are forbidden by the Fourteenth Amendment to abridge." (Emphasis added.) *Walker v. Sauvinet*, 92 U.S. 90, 23 L. Ed. 678 (1875).

I might further suggest that a careful reading of the proposition of law set forth in the Petition indicates that the same question was not posed to the Courts below. As a matter of fact, in the Court of Appeals for the 6th Appellate District of Ohio, the first appellate court to hear this matter, the petitioners did not argue this point.

In summary, it might be said that the petitioners seek to have the Court reverse longstanding precedent in regard to each of the points they raise. It is further noted that, in regard to the points they argue, the questions are moot by virtue of the prior decisions. Thus, for the fore-

going reasons, it is respectfully requested that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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